No. 82-584

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IN THE

Supreme Court of the United States

October Term, 1982

E. W. JONES, Superintendent,

Petitioner,

against

FELIX RAMIREZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether the conflicting decisions of the United States Courts of Appeals applying this Court's holding in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), should now be resolved.

2. Whether the jury charge, read as a whole and in view of its repeated stress upon the reasonable doubt standard, more than adequately emphasized the prosecution's burdens of proof and persuasion, and thus in no way deprived respondent of due process or a fair trial, despite incidental use of language condemned in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979).

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Preliminary Statement

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner E. W. Jones seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit which affirmed an order and judgment granting respondent's petition for a federal writ of habeas corpus.

In his single-point petition for a writ of habeas corpus, respondent claimed that his conviction for Manslaughter

in the First Degree was obtained in violation of due process of law, as enunciated in this Court's decision in *Sandstrom* v. *Montana*, 412 U.S. 510 (1979), in that the trial court's "natural and probable consequences" charge concerning intent impermissibly shifted the burden of proof.

Since this Court's decision in *Sandstrom, supra*, the United States Courts of Appeal have diverged markedly in their interpretations and applications of the holding of that case, and have already rendered a number of decisions in conflict with each other. Coherence of federal jurisprudence therefore requires that a writ of certiorari issue not only to resolve the conflict among the Circuits, but also to review the Second Circuit's application of *Sandstrom* to the instant case.

Opinions Below

The opinion of the Court of Appeals, which is reported at 683 F.2d 712 (1982), is set forth in Appendix A, *infra*. The opinion of the United States District Court for the Southern District of New York, which is reported at 530 F. Supp. 345 (1981), is set forth in Appendix B, *infra*.

Jurisdiction

This Court's jurisdiction is invoked pursuant to Title 28, United States Code, § 1254(1).

Constitutional Provisions Involved

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law . . . .

Statement of the Case

A. State Proceedings

1. The Indictment

By Indictment No. 2682/76, filed December 8, 1976, the Grand Jury of Bronx County charged respondent with Murder in the Second Degree and Criminal Possession of a Weapon in the Fourth Degree.

2. The Trial

a. The People's Case

One week before the death of Estaban (a.k.a. "Smokey") Casilla on November 11, 1976, his female companion and roommate, one **Maria Ramirez**, saw respondent in the La Revancha Social Club in the Bronx. (Maria had formerly lived with respondent as his common-law wife from 1971 until 1972.) Respondent approached Maria, and when an argument ensued, they went outside the club, where respondent "smacked" her three times and hit her against a sign pole. In return, Maria took off her shoes and hit respondent on the forehead, cutting him. As the fight continued, Smokey appeared and began "tussling" with re-

spondent, who ran away. Respondent returned a few minutes later with two police officers, who told Maria they were looking for someone who had robbed respondent and beaten him up. After talking with Maria, the officers got into their patrol car, leaving respondent by himself (M. Ramirez: T. 18-23, 32-35).*

Maria next saw respondent one week later at approximately 7:30 p.m., on November 11, 1976, when he approached her again at the La Revancha Club and asked her where Smokey was. Maria left the club and went to the house of Smokey's sister, followed by respondent. There, she told Smokey, his brother Santana, and his friend "Tito" that respondent "was armed and not alone," whereupon Smokey ran out of the apartment with Tito (M. Ramirez: T. 23-25, 37-38).

Reynaldo Del Valle ("Cano") and **Leonard Lopez** were walking along the street when they saw Smokey, Santana and Tito coming out of the building. Tito was carrying a crowbar or police lock bar, and Cano was carrying a cane. Together the five men went to the social club, where Smokey and respondent began arguing "over a woman."** Respondent placed his right hand inside the left flap of his coat pocket, then pulled it out again. Smokey turned to remove his jacket, passing it to Cano. While Smokey's body was still turned, respondent again placed his right hand into the left flap of his coat, pulled out a knife and

* Numerical references preceded by "T" refer to minutes of the trial, dated March 20-31, 1978.

** Del Valle was "not sure" respondent was Smokey's assailant (T. 96), but he was certain that the man the police arrested at the scene was the man who had stabbed Smokey (T. 101). Moreover, Lopez positively identified respondent (T. 128).

stabbed Smokey in the chest area, mortally wounding him (Del Valle: T. 94-101; Lopez: T. 126-30, 144-47). The time sequence was such that Cano, who had turned to put down Smokey's jacket, did not see the actual stabbing, although he did see the knife in respondent's hand (Del Valle: T. 113). Smokey did not have a weapon (Del Valle: T. 98; Lopez: T. 132).

After the stabbing, Tito swung at respondent with the crowbar and Cano swung at him with his cane, hitting him on the shoulder (Del Valle: T. 99-100). Respondent circled like a caged animal, moving the knife in a lateral fashion parallel to the ground (Lopez: T. 130-31). In the meantime, Lopez rushed Smokey to Lincoln Hospital. Police Officers **Ernest Fleming** and **Gregory Hubner**, on foot patrol in the area, responded to screams that someone had been stabbed. Running to the social club, they drew their revolvers and ordered respondent to drop his knife, which he did. Respondent had to be restrained while Officer Fleming attempted to handcuff him and the crowd of about 25 people "surged" over him, and the officers had to call additional police units to the scene to assist them in their arrest (Fleming: T. 62-64; Hubner: T. 79-81).

After he arrived at the 42nd precinct, and after he had been treated for an arm injury at the hospital, respondent voluntarily made a statement to Detective **Daniel Danaher.** He stated that he had been approached by a group of youths, at least one of whom had robbed him on a previous occasion. They had sticks and bats and one of them said to him, "you want the same thing I gave you last time,"

referring to a beating he had received. When respondent was informed, toward the end of his statement, that Smokey had died, he said in English, "Good, that's what I wanted to do" (Danaher: T. 160-62).

Respondent then voluntarily made a statement to Assistant District Attorney **Edwin Knauer**. Essentially repeating his statement to the detective, respondent added that Smokey was the man who had robbed him on the previous occasion, that he (respondent) had previously threatened to "get even" with Smokey, that he stabbed Smokey when Smokey raised a police lock bar, and that his arm was broken by a police officer who hit him with a nightstick (Knauer: T. 205, 207-08). Respondent denied knowing that Maria was living with anyone and denied ever having seen her with Smokey or ever having argued with Smokey over a woman (Knauer: T. 205-12).

Deputy Chief Medical Examiner **Michael Baden** testified that the cause of death was a single stab wound between the chest and abdomen which penetrated four to five inches, cutting the liver and the heart and causing extensive internal hemorrhaging and bleeding.

b. The Defense

Respondent took the stand and testified that on October 30, 1976, he went to La Revancha Social Club, where he saw Maria Ramirez but did not speak with her. Leaving the club, he was robbed by three men, whom he had never previously seen. While two of them held him by either arm, a man whom he later found out was Smokey punched him in the nose and struck him repeatedly, then took his money,

his watch, and a chain with a ring and a medal on it (F. Ramirez: T. 288-91).

Respondent did not see his assailants again until November 11, 1976, when he recognized Smokey carrying a police lock bar, at the head of a group of five men who were carrying sticks and canes. Smokey told respondent, who was surrounded, that they were going to do to him the "same thing" they had done to him the first time. Smokey stepped close and swung the crow bar at respondent, who ducked, pulled a knife and stabbed Smokey (F. Ramirez: T. 300-04).

Respondent testified he had his knife in his pocket, holding it by its handle because he was "scared" and "nervous" about being surrounded. He pulled out his knife and stabbed Smokey not with the intention of killing him, but of defending himself (F. Ramirez: T. 308, 320, 322).

Respondent asserted he had acted alone and that Maria Ramirez had lied on the stand, and he denied telling Detective Danaher that he intended to kill Smokey (F. Ramirez: T. 331, 325-27, 343).

c. The People's Rebuttal Case

The People called respondent's sister, also named **Maria Ramirez**. She testified that she saw the other Maria Ramirez and respondent argue inside the social club on October 30, 1976, and that their argument continued outside (M. Ramirez [sister]: T. 367).

On November 11, 1976, the witness was at the social club with the other Maria Ramirez when respondent, his brother

Julio, and his friend Papo came in. Respondent told Maria Ramirez to "go get your guys," which she did. The witness told Papo to take him away. When Smokey arrived at the club, and before the fight started, the witness left the scene (M. Ramirez [sister]: T. 351-53, 368-69).

Finally, Maria Ramirez had given the witness, for return to respondent, a Sagittarius medallion that she had found after the October 30 fight involving respondent, Smokey, and herself (M. Ramirez [sister]: T. 354).

d. The Court's Charge

At the conclusion of the evidence, the court instructed the jury, in pertinent part, as follows:

> Let me now define this word intent for you.
>
> *A person is presumed to intend the natural and probable consequences of his acts.* Criminal intent is an intent to do knowingly and willfully that which is condemned as wrong by law. *A criminal intent may be inferred from all the circumstances of the case.* It need not be established by direct proof to constitute the crime. There must not only be the act, but also the criminal intent and these must occur. The latter being equally essential with the former. *The existence of criminal intent constitutes a question of fact for the determination by you. The burden of showing intent, the intent with which a crime has been committed rests upon the Prosecution to establish by evidence beyond a reasonable doubt.* So where *the law requires that the People must establish a specific or certain intent* on the part of the one charged with the commission of the crime, the law does not expect or require for obvious reasons that intent must be proved by direct

proof of an absolute certainty or with mathematical precision. Intent, and I mean criminal intent, is always an essential element to the commission of a crime such as we have here. It may be proved by direct evidence or it may be proved from circumstances surrounding the transaction or act itself, or it may be proved by a combination of both.

Well, what is intent? Intent is the frame of mind of the perpetrator of the act at the time it is committed. You must probe the mind. You may say to yourselves, well, how are we to determine what a person's intentions are? Well, ladies and gentlemen, we can only determine that by one's acts, by one's conduct, by what was done and what was said, if anything. You should consider what was allegedly done; what means were allegedly employed; the type of instrument allegedly used, if any; the part of the body allegedly attacked; and all these circumstances, and from these surrounding circumstances, *you then are to determine the intention of the perpetrator at the time.*

Under our law, every person is presumed to intend the natural and inevitable consequences of his own acts. The jury has the right to infer from the results produced, the intention to effect such result. The intent formed is a secret and silent operation of the mind, and its physical manifestation of the intent exhibited by the results produced is the safest, if not the only proof of the fact to be ascertained. A person acts intentionally with respect to a result or to conduct described by Statute defining an offense when his conscious objective is to cause such result or to engage in such conduct. (T. 520-523) [emphasis added]

* * *

Here there is no statutory or legal requirement that premeditation or deliberation be present for one to be proven guilty of Murder in the Second Degree. All that the *People are required to prove beyond a reason-*

> *able doubt is that the defendant formed an intent* to kill a human being and pursuant to that intent unlawfully caused the death of that person (T. 524) [emphasis added]

Defense counsel made no objection to these instructions, nor to the charge of self-defense, which was as follows:

> Now, members of the jury, the heart of the defense in this case is one of the justification or as it is commonly known self-defense. *Here the Prosecution has the burden of proving beyond a reasonable doubt* that this defendant's act or acts were not justified. (T. 529) [emphasis added]

In the entire charge, which encompassed 31 pages of transcript, the trial court alluded to and explained the nature and importance of the reasonable doubt standard—and the role and responsibility of the jury in assessing such doubt—no less than 40 times.

3. Verdict and Sentence

On April 2, 1978, after approximately seven hours of deliberation, the jury returned a verdict acquitting respondent of second degree murder but finding him guilty of manslaughter in the first degree. On May 4, 1978, respondent was sentenced to an indeterminate period of imprisonment with a minimum of five and a maximum of fifteen years.

4. Appellate Proceedings

Before the Appellate Division, First Department, of the New York State Supreme Court, respondent argued that, since his state of mind was the sole question for the jury, the above-quoted portion of the charge unconstitutionally shifted the burden of proof as to intent and thereby

deprived him of due process of law. In a 3-2 decision (which ignored the District Attorney's "procedural bar" argument and addressed itself solely to the merits), the majority of the First Department disagreed and concluded that, read as a whole, the charge was merely permissive and properly "stressed the obligation of the prosecution to establish intent beyond a reasonable doubt."

Leave to appeal to the New York Court of Appeals was soon denied, and respondent subsequently sought review of the charge issue in a single-point petition for a federal writ of habeas corpus.

B. Federal Proceedings

On February 9, 1981, respondent filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, claiming that the trial court's charge to the jury had impermissibly shifted the burden of proof, in violation of federal due process standards.

By opinion and order dated November 16, 1981, the United States District Court for the Southern District of New York (*Motley*, J.) accepted respondent's argument, granted the writ, and directed that respondent be released unless retried within sixty (60) days of the date of the order.

On December 7, 1981 the State filed a notice of appeal from the District Court's order, and on December 18, 1981 its application for a stay pending appeal was granted by that court.

On June 30, 1982, the United States Court of Appeals for the Second Circuit affirmed the decision of the District Court granting the writ of habeas corpus.

Reasons for Granting the Writ

The divergent methods employed by the federal courts of appeals in analyzing *Sandstrom* errors and considering remedies therefor have led to such disparate results that this Court's guidance is required in order to resolve existing conflicts among the circuits and to provide future assistance to state and federal courts in properly defining and allocating burdens of proof in jury instructions.

Since this Court's decision in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), the federal courts of appeals have assessed *Sandstrom* errors in different and often conflicting ways. Under any of the standards, policies, or methods of analysis which the circuit courts employ, however, the charge to the jury in the instant case would not be viewed as having deprived respondent of due process of law.

A. First Circuit Analysis

When faced with an ostensible *Sandstrom* violation, the First Circuit focuses its analysis on the alleged burden-shifting language itself, and then considers the charge as a whole *vis-a-vis* the "reasonable juror" test. *U.S.* v. *Winter*, 663 F. 2d 1120 (1st Cir. 1981); *U.S.* v. *Ciampaglia*, 628 F. 2d 632 (1st Cir.), *cert. denied*, 449 U.S. 956 (1980); *McInerney* v. *Berman*, 621 F. 2d 20 (1st Cir.), *cert. denied*, 449 U.S. 867 (1980); *Gagne* v. *Meachum*, 602 F. 2d 471 (1st Cir.), *cert. denied*, 444 U.S. 992 (1979).

A presumption which shifts the burden of proof to the defendant can be recognized by language which instructs the jury that proof of the predicate implies proof of the presumed fact unless disproved by the defendant himself

by a preponderance of the evidence. *McInerney* v. *Berman*, 621 F. 2d at 23. Additionally, a reasonable juror can be expected to listen to all s/he is told by the judge, and will be presumed not to have isolated a particular portion of the charge and ascribed to it more importance than the rest, especially where the jury has been instructed repeatedly that the prosecution must prove its case by proving every element of the offense beyond a reasonable doubt, and would have properly understood the instructions on presumption to mean that they could use common sense inferences from the facts surrounding the crime in deciding whether the prosecution had proved its case. *Id.* at 24.

Moreover, even in cases where the alleged *Sandstrom* error occurs at a crucial point in the instruction, the First Circuit has refrained from finding reversible error. *U.S.* v. *Ariza-Ibarra*, 605 F. 2d 1216, 1228 (1st Cir. 1979), *cert. denied*, —— U.S. ——, 102 S.Ct. 392 (1981). In that case, a charge essentially identical to the one in the case at bar was the *last* thing the judge said to the jury, thereby giving it even greater impact. Yet the court still declined to reverse on that basis.*

Finally, the First Circuit has also found a *Sandstrom* error to be harmless beyond a reasonable doubt where it did not contribute to a defendant's conviction. *U.S.* v. *Winter*, 663 F. 2d at 1144.

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* *Cf. Arroyo* v. *Jones*, No. 82-2072, slip op. at 4100 (2nd Cir., July 23, 1982) (petition for certiorari filed *sub. nom. Jones* v. *Arroyo*) (affirming district court's granting of writ due to *Sandstrom* error in supplemental charge, which was "the last sentence [the jury] heard before returning for their final minutes of deliberation").

B. Second Circuit Analysis

In cases involving claimed *Sandstrom* violations, the Second Circuit concentrates its inquiry on whether the jury charge contained language which was ameliorative of the impermissible phrase, and, following this Court's directions in *Cupp* v. *Naughten*, 414 U.S. 141, 146-47 (1973), requires habeas corpus petitioners to show that a challenged instruction "by itself so infected the entire trial that the resulting conviction violates due process." *See Nelson* v. *Scully*, 672 F. 2d 266 (2d Cir. 1982); *Mancuso* v. *Harris*, 667 F. 2d 206, 211 (2d Cir. 1982); *Washington* v. *Harris*, 650 F. 2d 447 (2d Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1455 (1982); *Callahan* v. *Lefevre*, 609 F. 2d 70 (2d Cir. 1979). Moreover, in most of these cases, the Second Circuit reiterates the principles that one erroneous instruction will not necessarily result in a deprivation of a defendant's constitutional rights, and that the challenged instruction must be viewed in the context of the overall charge and with reference to whether the jury would understand the correct rule from the charge as a whole. Indeed, the circuit has explicitly cautioned against any "overly broad reading" of *Sandstrom*, *Washington* v. *Harris*, 650 F. 2d at 452, and has recently found a *Sandstrom* error contained within a charge virtually identical to that in the case at bar to have been ameliorated merely by the phrase "unless such acts were done under circumstances which would preclude the existence of such intent." *Rivera* v. *Coombe*, No. 82-2086 (2d Cir., June 29, 1982).

C. Third Circuit Analysis

The Third Circuit conducts its review of alleged *Sandstrom* violations by determining the "infectious" nature of the instruction, the reliance by the jury upon that in-

struction, and the effect of the charge as a whole. *Martin* v. *Warden, Huntington State Correctional Institution,* 653 F. 2d 799 (3rd Cir. 1981), *cert. denied,* —— U.S. ——, 102 S.Ct. 1019 (1982); *U.S. ex rel. Goddard* v. *Vaughn,* 614 F. 2d 929 (3rd Cir.), *cert. denied,* 449 U.S. 844 (1980). In ascertaining whether the jury was influenced by the erroneous instruction, this circuit examines the way in which a juror could have reasonably interpreted the instruction and whether it can be said with some degree of certainty that the jury did not rely on an erroneous charge. *Martin* v. *Warden,* 653 F. 2d at 802.

D. Fourth Circuit Analysis

In the Fourth Circuit, analysis of a *Sandstrom* problem "necessarily begins with inquiry into the nature of the presumption created by [the instruction]," *Baker* v. *Muncy,* 619 F. 2d 327, 330 (4th Cir. 1980), with the court looking at the actual language of the instructions to determine whether "a reasonable juror could have given the presumption conclusive or persuasion-shifting effect." *Id.*

The fatal language in *Baker* was explicit in shifting the burden to the defendant:

> . . . delivery of a mortal wound with a deadly weapon and without sufficient provocation '*throws upon the slayer the necessity of showing extenuating circumstances.*' (emphasis added) 619 F. 2d at 33.

This instruction, taken with a further instruction that the presumption thus created may be overcome by "proof of extenuating circumstances sufficient to create a reasonable doubt," would cause a reasonable juror to view this burden of creating reasonable doubt as one of persuasion to be borne by the defendant. 619 F. 2d at 330.

E. Fifth Circuit Analysis

The Fifth Circuit concentrates its analysis on the final outcome of a case involving alleged *Sandstrom* violations, *Tennon* v. *Ricketts*, 642 F. 2d 161 (5th Cir. 1981); *Holloway* v. *McElroy*, 632 F.2d 605 (5th Cir. 1980), *cert. denied*, 451 U.S. 1028 (1981), and includes consideration of the language used, the nature of the presumption created, the charge as a whole, and the reasonable interpretation of the charge by the jurors. *Washington* v. *Watkins*, 655 F. 2d 1346 (5th Cir. 1981); *Tyler* v. *Phelps*, 643 F. 2d 1095 (5th Cir. 1981); *U.S.* v. *Caucci*, 635 F. 2d 441 (5th Cir. 1981); *U.S.* v. *Freeman*, 619 F. 2d 1112 (5th Cir. 1980), *cert. denied*, 450 U.S. 910 (1981); *Mays* v. *Balkcom*, 631 F. 2d 48 (5th Cir. 1980).

In *Holloway* v. *McElroy*, *supra*, petitioner argued that the trial court's instruction as to the presumption of malice had relieved the prosecution of its obligation to prove beyond a reasonable doubt every essential element of the crime of murder. Noting that "[h]ad the jury found Holloway guilty of malice murder, the trial court's instructions on malice would certainly have been relevant," the Fifth Circuit nevertheless found that, by pleading self-defense, petitioner had voluntarily focused the entire determination of his criminal culpability on the single question of whether the homicide was justified. Accordingly, when the jury found him guilty only of voluntary manslaughter, petitioner was "in no position to complain" about the *Sandstrom* error, "since it did not ultimately work to his detriment" and was harmless beyond a reasonable doubt.* 632 F. 2d at 617-18.

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* Similarly, in the case at bar, respondent's assertion of self-defense rendered the *Sandstrom* error harmless, for the presumption affected neither the defense of justification nor the State's obligation

(footnote continued on next page)

Finally, the Fifth Circuit has also held that a burden-shifting instructions stating a presumption rather than an inference of intent violate due process and *Sandstrom*, but do not automatically require reversal where there is evidence before the jury of objective conduct demonstrating criminal intent.* *U.S.* v. *Caucci*, 635 F. 2d at 447. *See also U.S.* v. *Meadows*, 598 F. 2d 984 (5th Cir. 1979).

F. Sixth Circuit Analysis

The Sixth Circuit places emphasis on the language actually used in the charge, and whether there is sufficient qualifying or curative language which would enable a reasonable juror to interpret the charge as not shifting any burden to the defendant.** *Harless* v. *Anderson*, 664 F. 2d

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to prove beyond a reasonable doubt each element of the crime. Indeed, since the instruction concerning self-defense was utterly correct, was given in the midst of a charge which emphasized the prosecution's burden of proof no less than forty times, and contained no intimation that respondent must substantiate his claim of self-defense, it is inconceivable that respondent was harmed by two presumptive sentences within the charge, especially since, like petitioner Holloway, he was found guilty of the lesser included offense of manslaughter in the first degree.

* In the instant case, respondent's admission to a detective that he had intended to kill Smokey, his admission to an assistant district attorney that he had threatened to "get even" with his victim, and the fact that respondent caused Smokey's death by a single, well-placed stab wound to the heart are demonstrably objective evidence that respondent intended, at a minimum, to cause serious physical injury, and that habeas corpus relief from a first degree manslaughter conviction was not warranted.

** The charge in the case at bar contained the instruction, "A criminal intent *may* be inferred from all the circumstances of the case." (emphasis added). One day earlier than the Second Circuit's decision in this case, a different panel of the circuit found this same phrase to have ameliorated the burden-shifting effect of the *Sandstrom* error. *Rivera* v. *Coombe*, No. 82-2086 (2d Cir., June 29, 1982).

610 (6th Cir. 1981) (*as amended*, March 8, 1982); *Burton* v. *Bergman*, 649 F. 2d 428 (6th Cir. 1981), *cert. granted and vacated* (on other grounds), —— U.S. ——, 102 S.Ct. 2026 (1982); *U.S.* v. *Williams*, 665 F. 2d 107 (6th Cir. 1981); *Krzeminski* v. *Perini*, 614 F. 2d 121 (6th Cir.), *cert. denied*, 449 U.S. 866 (1980). Moreover, this circuit is guided by the principle that when the evidence of guilt properly admitted at trial is overwhelming, an error of constitutional dimension may be harmless. *Mitchell* v. *Engle*, 634 F. 2d 353 (6th Cir. 1980).

Although there are within the Sixth Circuit a few cases which do not go beyond finding plain error under *Sandstrom* where an instruction is subject to an interpretation by a jury that an irrebuttable presumption is created, *see, e.g., U.S.* v. *Williams*, 665 F. 2d at 710, the circuit generally examines a charge as a whole to determine if sufficient safeguards are attached to prevent the shifting of burdens to the defendant, and (like the Second Circuit) is reluctant to provide an overbroad interpretation of *Sandstrom*. *See Harless* v. *Anderson*, 664 F. 2d at 615.

G. Seventh Circuit Analysis

The Seventh Circuit is satisfied that no *Sandstrom* violation occurs, and, hence, no denial of due process ensues, when a charge contains no mandatory injunction to presume intent and tells the jury that any presumption of "a criminal intent from an unlawful act knowingly done" is rebuttable by "justifying or excusing facts." *Jacks* v. *Duckworth*, 651 F. 2d 480, 486 (7th Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1010 (1982). The jury in *Jacks* was also told that they could "look to all the surrounding circumstances, including what was said and done in rela-

tion thereto" to determine intent, 651 F. 2d at 486—a phrase which was found to have offset the questionable instruction, "Everyone intends the natural and probable consequences of his voluntary acts." 651 F. 2d at 486.*

H. Eighth Circuit Analysis

Emphasis on the jury's role as factfinder, as well as on the language used and the weight of the evidence against a defendant, characterize the Eighth Circuit's approach to a *Sandstrom* problem. *U.S.* v. *Ming Sen Shiue*, 650 F. 2d 919 (9th Cir. 1981); *Nelson* v. *Solem*, 640 F. 2d 125 (8th Cir. 1981); *Dietz* v. *Solem*, 640 F. 2d 126 (8th Cir. 1981); *Bonnett* v. *Solem*, 640 F. 2d 125 (8th Cir. 1980), *cert. denied*, —— U.S. ——, 101 S.Ct. 2329 (1981).

A charge to the jury which allows jurors to decide what facts to find from the evidence and permits them to make their own determination, only allows the jury to *consider* that a "person intends the natural and probable consequences of acts knowingly done," *U.S.* v. *Ming Sen Shiue*, 650 F. 2d at 924, and is therefore effectively permissive rather than mandatory.

In contrast to the Second and Seventh Circuits, however, the Eighth Circuit will not uphold instructions which include a phrase to the effect that the presumption that one intends the natural and probable consequences of his acts may be offset by "extenuating circumstances" or "unless it appears from the evidence that some other purpose or unexpected consequence was in the mind of the actor at the time." *Dietz* v. *Solem*, 640 F. 2d at 131.

* Since the instructions in the case at bar contained virtually the same offsetting phrase, the charge would surely have withstood scrutiny within the Seventh Circuit.

I. Ninth Circuit Analysis

The crux of the Ninth Circuit's review of alleged *Sandstrom* violations is a determination of whether the jury would have reached the same conclusion even absent the disapproved jury instruction, thereby making the error complained of harmless. *McGuinn* v. *Crist*, 657 F. 2d 1107 (9th Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1614 (1982). In that case, an erroneous instruction regarding presumption of intent from the ordinary consequences of voluntary acts was found to be harmless in light of evidence of deliberate homicide (four shots to the head at close range) and proper instructions with respect to the only disputed issues in the case. 657 F. 2d at 1109.

Additionally, the Ninth Circuit also holds that instructions regarding intent inferable from surrounding circumstances are proper and in keeping with principles of due process.* *See U.S.* v. *Mayo*, 646 F. 2d 369, 375 (9th Cir.), *cert. denied*, —— U.S. ——, 102 S.Ct. 979 (1981); *U.S.* v. *Ross*, 626 F. 2d 77, 79-80 (9th Cir. 1980).

J. Tenth Circuit Analysis

The Tenth Circuit focuses on the language used in the charge to the jury and the nature of the presumption created, and will allow inferences regarding intent where proper emphasis is placed on the burden to be borne by the government. *U.S.* v. *White*, 649 F. 2d 779 (10th Cir.), *cert. denied*, —— U.S. ——, 102 S.Ct. 357 (1981); *U.S.* v.

* Since the charge concerning self-defense in the case at bar was entirely correct and unobjected to, and since the instructions regarding the intent inferable from surrounding circumstances are not violative of due process, respondent's conviction would have been upheld in the Ninth Circuit.

Tecumseh, 630 F. 2d 749 (10th Cir.), *cert. denied*, 449 U.S. 961 (1980); *U.S.* v. *Ogle*, 613 F. 2d 233 (10th Cir. 1979), *cert. denied*, 449 U.S. 825 (1980). These cases did not involve use of *Sandstrom* language *per se*, but rather permissive instructions regarding inferring intent from the surrounding circumstances of the case.

It is quite apparent that this Court's decision in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979) has generated widely disparate analyses of the effect of burden-shifting language, and it is equally evident that the jury charge preceding respondent's conviction for manslaughter in the first degree would have withstood scrutiny in many Courts of Appeals.

To be sure, two sentences out of the court's 31-page charge in the instant case bore a superficial similarity to the burden-shifting language condemned in *Sandstrom*, but these errors were more than offset and cured by the court's repeated emphasis on the fact-finding function of the jury and the burden of proof to be borne throughout by the prosecution. In *Sandstrom*, the trial court's charge concerning intent consisted of the single unqualified sentence, "The law presumes that a person intends the ordinary consequences of his voluntary acts," and defendant therein vigorously objected to the inclusion of this language in the instruction. In contrast, the trial court in the case at bar went to great lengths to explain that the issue of respondent's intent was a factual one which only the jury could determine, and to qualify almost every page of its instructions with continual reminders that the burden of proof with regard to everything at issue (including but

not limited to disproving respondent's defense of justification) rested squarely, unambiguously, and unequivocally upon the People. Moreover, respondent made no objection to the error now complained of, nor to the instruction regarding self-defense, and in view of this Court's prior holding that an unobjected-to instruction will rarely constitute a denial of due process warranting federal habeas corpus relief, *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977), the instant case presents an unusually timely opportunity for clarification of the import of a *Sandstrom* error which was not the target of a contemporaneous objection and which has become susceptible of many modes of analyses by the Courts of Appeals. *See Jones* v. *Arroyo*, No. 82-2072 (2d Cir., July 23, 1982) (petition for certiorari filed).

In sum, then, although the court's charge contained two objectionable sentences, the remainder of the charge ameliorated rather than exacerbated this error. Plainly, respondent profited from the court's instruction, for after having told both a detective and an assistant district attorney that he intended to kill or get even with Smokey, he nevertheless convinced the jury that he possessed no such intent—a feat he could not have accomplished had the jury improperly employed the presumption inviting them to equate the consequence (death) with the intent. *See United States* v. *Winter*, 663 F. 2d 1120, 1144 (1st Cir. 1981) (error in jury instruction harmless beyond a reasonable doubt because it did not contribute to defendant's conviction). *See especially Holloway* v. *McElroy*, 632 F. 2d 605, 617-618 (5th Cir. 1980) (erroneous instruction as to presumption of malice held harmless beyond a reasonable doubt where jury ultimately convicted defendant of voluntary man-

slaughter). Since the guidance given the jury was more than adequate to enable it to fulfill its function properly, and since the jury obviously functioned in respondent's favor by acquitting him of murder in the second degree, any error in the court's instructions must be viewed as harmless. *Chapman* v. *California,* 386 U.S. 18 (1967).

Accordingly, the decision of the United States Court of Appeals for the Second Circuit should be reversed and the petition for a writ of habeas corpus denied.

Conclusion

The petition for a writ of certiorari should be granted.

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October 1, 1982

Respectfully submitted,

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